QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts a State's ability to regulate the wages of apprentices on state-funded public works projects.

PARTIES TO THE PROCEEDING

Respondent Dillingham Construction, N.A., Inc. is a privately held corporation. Its parent companies are Dillingham Construction Corporation and Dillingham Construction Holdings, Inc. A related subsidiary corporation is Dillingham Construction Canada, Ltd.

Respondent Manuel J. Arceo, dba Sound Systems Media is a sole proprietorship, not a corporation.

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STATEMENT OF THE CASE

I. THE STATE OF CALIFORNIA WAS ATTEMPTING TO REGULATE THE WAGES OF APPRENTICES WORKING ON A STATE-FUNDED PUBLIC WORKS PROJECT

In the Spring of 1987 Respondent Dillingham Construction became the general contractor for a state-funded public works contract known as the Sonoma County Main Adult Detention Facility. Pet. App. 25, 26 n.1. The electronic installation work was subcontracted to Respondent Manuel J. Arceo, doing business as Sound Systems Media (Sound Systems). Pet. App. 25.

When the subcontract was awarded to Sound Systems, it was signatory to a collective bargaining agreement with International Brotherhood of Electrical Workers Local 202 (Local 202). Pet. App. 26. The collective bargaining agreement contained a wage scale for apprentice electronic technicians and required Sound Systems to make contributions to an apprenticeship program known as the Northern California Sound and Communications Joint Apprenticeship Training Committee (Nor. Cal. JATC). Pet. App. 26. The Nor. Cal. JATC was approved by the California Apprenticeship Council. Pet. App. 26.

In May 1988, shortly after Sound Systems began working on the project, Local 202 disclaimed interest in representing the electronics technician employees of Sound Systems. Pet. App. 26. In response to this unexpected development, Sound Systems was forced to seek out another collective bargaining partner.

In June 1988, one month after the disclaimer of interest by Local 202, Sound Systems signed a new collective bargaining agreement with the National Electronic Systems Technicians Union (NESTU). Pet. App. 26. The NESTU collective bargaining agreement also contained an apprenticeship wage scale, and it created a new apprenticeship program, the Electronic and Communications Systems Joint Apprenticeship and Training Committee (E&C JATC). Pet. App. 26.

As noted by Petitioners, apprenticeship standards for the new E&C JATC were in place by June 20, 1988. R. 39. However, the California Division of Apprenticeship Standards did not approve the E&C JATC until August 15, 1989. J.A. 116-117. Final approval of the E&C JATC by the California Apprenticeship Council did not take place until September 19, 1990 because of objections filed by the Nor. Cal. JATC, the apprenticeship program sponsored by Local 202. J.A. 113-115.

In reliance on the NESTU collective bargaining agreement and the E&C JATC, Sound Systems employed apprentices to work on the Main Adult Detention Facility and paid them wages which were less than the state-approved prevailing wage rate for journeyman electronics technicians. Pet. App. 27. In response to a complaint filed by International Brotherhood of Electrical Workers Local 551, the Division of Labor Standards Enforcement issued a Notice to Withhold directing the County of Sonoma to withhold monies from Dillingham Construction. Pet. App. 27. The basis for the Notice was that the apprentices employed by Sound Systems were not participating in a state-approved apprenticeship program and Sound Systems was therefore not entitled to

pay them less than the prevailing wage rate for journeyman electronics technicians. Pet. App. 27-28; Pet. Br. 15-16.

II. THE PROCEEDINGS BELOW

In response to the Notice to Withhold, Respondents filed a complaint for declaratory relief alleging that the State's action was preempted by both the National Labor Relations Act (NLRA) and ERISA. J.A. 3-35. The district court granted summary judgment in favor of Petitioners (Pet. App. 23-52), but the Ninth Circuit reversed, holding that the State's application of its prevailing wage law to an ERISA apprenticeship program is preempted by ERISA. Pet. App. 1-22. Because the Ninth Circuit ruled in favor of Respondents on the ERISA preemption issue, it did not address the issue of NLRA preemption. Pet. App. 18.

SUMMARY OF ARGUMENT

All aspects of an apprenticeship program such as the E&C JATC constitute an employee welfare benefit plan within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1). This conclusion is dictated by the plain language of section 3(1), which provides that an employee welfare benefit plan is "any plan, fund or program . . . established or maintained . . . for the purpose of providing . . . apprenticeship or other training programs. . . . " 29 U.S.C. § 1002(1). The purposes of ERISA, the regulations issued by the Secretary of Labor pursuant to ERISA and the

limited legislative history are all consistent with the literal language of § 3(1). Finally, there is no dispute among the lower courts that an apprenticeship program, and not merely its funding mechanism, is an employee welfare benefit plan entitled to the protections of ERISA's preemption provision.

The prevailing wage statute which Petitioners seek to enforce, Cal. Lab. Code § 1777.5 (Pet. App. 58-63), satisfies the "relate to" test of ERISA's preemption clause, 29 U.S.C. § 1144(a). Consistent with the decisions of this Court, the statute is presumptively preempted because it "specifically refers to" ERISA apprenticeship plans, it mandates the specific benefits which must be provided by an apprenticeship plan on state-funded public works projects, and it is "specifically designed to affect" apprenticeship programs. Because the E&C JATC is the product of collective bargaining, the federal interest in preemption is heightened. *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504, 525-26 (1981). Failure to apply ERISA's preemption provision would subject apprenticeship programs, particularly multi-state apprenticeship programs, to conflicting and inconsistent state regulations.

California's prevailing wage statute is not "saved" from preemption because it is not a means of enforcing the federal Fitzgerald Act, 29 U.S.C. § 50. The Fitzgerald Act does not require or prohibit any conduct and therefore it does not contain any commands which are capable of being enforced by a state law. *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555, 1562 (10th Cir. 1992), *cert. denied*, 506 U.S. 953 (1992).

If ERISA's savings clause has any application to this case, it merely saves the regulations issued by the Secretary of Labor pursuant to the Fitzgerald Act. 29 C.F.R. § 29.1, *et seq.* Pursuant to those regulations, an approved State Apprenticeship Council may approve an apprenticeship program solely for *federal purposes*. *See e.g.*, 29 C.F.R. § 29.2(l) and (o). Thus, a State Apprenticeship Council may approve an apprenticeship program for *federal purposes* such as eligibility to work on a federally-funded Davis-Bacon project. However, a state may not exercise its approval authority for *state purposes* such as eligibility to work on a state-funded public works project.

ARGUMENT

I. THE E&C JATC, IN ALL ITS ASPECTS, IS AN EMPLOYEE WELFARE BENEFIT PLAN GOVERNED BY ERISA

A. The Lower Courts Have Consistently Ruled That All Aspects Of An Apprenticeship Program Constitute An Employee Welfare Benefit Plan

The United States and amicus AFL-CIO would have this Court believe that the threshold issue – whether or not a jointly administered apprenticeship program is an ERISA employee welfare benefit plan – is an issue of first impression not only for this Court, but for the lower courts as well. In fact, this issue has been addressed by numerous federal courts and several state courts.

Without exception, all of the courts which have addressed this issue have ruled that an apprenticeship program or training program is an employee welfare benefit plan within the meaning of ERISA § 3(1), 29

U.S.C. § 1002(1). No lower court has limited ERISA coverage to the funding mechanism for an apprenticeship program as amicus AFL-CIO would do, or to funded apprenticeship programs as the United States would do. *See, e.g., Keystone Chapter, ABC v. Foley*, 37 F.3d 945, 954 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995); *National Elevator Industry Inc. v. Calhoon*, 957 F.2d 1555, 1561 (10th Cir. 1992), *cert. denied*, 506 U.S. 953 (1992) (the National Elevator Industry Education Program "is undisputedly an ERISA employee benefit plan"); *Hydrostorage v. Northern Cal. Boilermakers*, 891 F.2d 719, 727-28 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990); *Citrin v. Erikson*, 911 F. Supp. 673, 680 (S.D.N.Y. 1996); *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 439-40, 14 Cal. Rptr. 491 (1992); *Operating Engineers & Participating Employees v. Weiss Bros. Construction Co.*, 221 Cal. App. 3d 867, 879, 270 Cal. Rptr. 786 (1990).[1]

In several other cases, the state agency defending an ERISA preemption attack has conceded that an apprenticeship program is, without limitation, an employee welfare benefit plan governed by ERISA. *See Boise Cascade Corp. v. Peterson*, 939 F.2d 632, 637 (8th Cir. 1991) ("the

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[1] The foregoing is only a partial listing of the Ninth Circuit decisions holding that an apprenticeship program is an ERISA employee welfare benefit plan. *See also Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270, 274 (9th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992); *Associated General Contractors, San Diego Chapter, Inc. v. Smith*, 74 F.3d 926, 929 (9th Cir. 1996); *WSB Electric, Inc. v. Curry*, Nos. 94-16613, 94-16646, 1996 U.S. App. LEXIS 16027 (9th Cir. July 5, 1996).

state [of Minnesota] has conceded that plaintiffs' pipefitter apprenticeship programs are 'employee welfare benefit plans' as defined by ERISA"), *cert. denied*, 112 S. Ct. 3014 (1991); *Minnesota Chapter, ABC v. Minnesota Dept. of Labor*, 47 F.3d 975, 980 (8th Cir. 1995) (same); *Associated Builders and Contractors v. Perry*, 817 F. Supp. 49, 51 (E.D. Mich. 1992) (concession by Michigan Department of Labor), appeal dismissed for lack of standing, 16 F.3d 688 (6th Cir. 1994).

Several courts which have addressed this issue have squarely held that all aspects of an apprenticeship program, not merely the funding mechanism, comprise an employee welfare benefit plan entitled to the protections of ERISA's preemption provision. In *Hydrostorage v. Northern Cal. Boilermakers*, the same parties who are Petitioners in this case argued that ERISA applies to an apprenticeship trust fund, but not to the apprenticeship standards dealing with matters such as minimum qualifications for apprentices, apprentice to journeyman ratios, terms and conditions of apprenticeships and wages and hours of apprentices. In rejecting this narrow definition of an employee welfare benefit plan, the Ninth Circuit relied on the literal language of the statute (29 U.S.C. § 1002(1)) and the lack of statutory definition or legislative history. *Hydrostorage*, 891 F.2d at 727. The court also observed that "[t]he Standards are an integral part of a larger 'program' established for the purpose of providing 'apprenticeship . . . training.' " *Hydrostorage*, 891 F.2d at 728. Other courts have reached the same conclusion in cases involving the same parties who are Petitioners in this case. *See Southern California Chapter, ABC v. California*

Apprenticeship Council, 4 Cal. 4th at 440; *Operating Engineers & Participating Employees v. Weiss Bros. Construction Co.*, 221 Cal. App. 3d at 875-77.

It is therefore not surprising that Petitioners did not raise or argue this issue in their petition for writ of certiorari or their brief on the merits. In fact, in their reply brief in support of the petition for writ of certiorari, Petitioners did not quarrel with Respondents' statement of the Question Presented by this case:

> Does the Employee Retirement Income Security Act of 1974 (ERISA) preempt a State's ability to enforce its prevailing wage laws, contrary to the terms of an apprenticeship program *which constitutes an employee welfare benefit plan within the meaning of ERISA.*

Resp. Br. in Opp. (emphasis added).

It is also noteworthy that Petitioners effectively conceded this issue in the district court and before the Ninth Circuit. In its two briefs to the Ninth Circuit, Petitioner Division of Apprenticeship Standards devoted a single footnote to this issue. Br. of Appellees 12 n. 10.

In short, the United States and amicus AFL-CIO are inviting this Court to address an issue as to which there is no disagreement in the lower courts and which was not vigorously litigated in this case before either the district court or the court of appeals.

B. The Plain Language Of ERISA Mandates The Conclusion That All Aspects Of The E&C JATC Are An Employee Welfare Benefit Plan

In interpreting ERISA's express preemption provision, this Court has stated that effect must be given to the plain language of the statute "unless there is good reason to believe Congress intended the language to have some more restrictive effect." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). The relevant statutory language is contained in ERISA § 3(1), which provides that:

> The terms "employee welfare benefit plan" and "welfare plan" mean any *plan, fund, or program* which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such *plan, fund, or program* was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . *apprenticeship or other training programs*, . . . or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1) (emphasis added).

In the context of this case, the plain language of ERISA § 3(1) is easy to restate: an employee welfare benefit plan includes any "plan, fund *or* program" established or maintained for the purpose of providing "apprenticeship or other training programs" for its participants. As this Court observed in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987), the express language of

ERISA presents a "formidable obstacle" to the positions advanced by the United States and amicus AFL-CIO.

The above-quoted definitional section is doubly formidable because of subsection (B). Under that provision, the "purpose" of a plan, fund or program governed by ERISA includes "any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions)." 29 U.S.C. § 1002(1)(B). One of the many benefits described in section 186(c) of Title 29 is "apprenticeship or other training programs." 29 U.S.C. § 186(c)(6). Speculation aside, there is no hard evidence that Congress intended ERISA section 3(1) to have a more restrictive effect than its plain language would suggest. Most importantly, ERISA does not further define a "plan, fund or program" or the term "apprenticeship or other training programs." *Massachusetts v. Morash*, 490 U.S. 107, 114 (1989). The regulations issued by the Secretary of Labor pursuant to ERISA also fail to define the relevant terms. *Hydrostorage*, 891 F.2d at 727; *see* 29 C.F.R. § 2510.3-1 (1988).[2]

Given the lack of statutory and regulatory definition, the courts which have considered this threshold issue have applied the literal language of section 3(1) to find that all aspects of an apprenticeship or training program comprise an employee welfare benefit plan subject to

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[2] Although the regulations issued by the Secretary of Labor pursuant to ERISA are decidedly unhelpful in construing the term "employee welfare benefit plan," the Secretary's own regulations issued pursuant to the Fitzgerald Act, 29 U.S.C. § 50, are consistent with the expansive interpretation suggested by the plain language of ERISA *See* section I(D) below.

ERISA. In *Hydrostorage*, the Ninth Circuit relied on the literal language of section 3(1) in concluding that the Apprenticeship Program administered by the Northern California Boilermakers Joint Apprenticeship Committee is an employee welfare benefit plan. 891 F.2d at 727. Quoting the district court (Schwarzer, J.), the court explained:

> There can be no question that the Apprenticeship Program under the Boilermakers collective bargaining agreement falls within the literal scope of [29 U.S.C. § 1002(1)'s] definition. It comprises a plan, fund, and program maintained by employers and the bargaining representative of their employees to provide its participants with apprenticeship training. That the Apprenticeship Fund itself may also be governed to an extent by other federal laws, as [the Division] argues, in no way takes the Apprenticeship Program out of the statutory definition.

Id. at 727. Applying the dictionary definitions of plan, fund and program, the Ninth Circuit also concluded that the Apprenticeship Standards governing apprentice training satisfy the definition of an ERISA plan. *Id.* at 728.

Similarly, in *National Elevator Industry, Inc. v. Calhoon*, the Tenth Circuit relied on the "clear language of the statute" in concluding that the National Elevator Industry Education Program (NEIEP), a national helpers' training program, is an employee welfare benefit plan. 957 F.2d at 1558. The court noted that the NEIEP is "administered by a board of trustees; it receives regular contributions from employers and exists for the exclusive benefit of employees." *Id.*

The statutory construction urged on the Court by amicus AFL-CIO would read out of section 3(1) the words "plan" and "program." In effect, the Court is being asked to judicially rewrite section 3(1) to define an employee welfare benefit plan as a "fund" established for the purpose of providing apprenticeship or other training.

The result of such a statutory interpretation would be to have one definition of an ERISA plan for purposes of providing apprenticeship or other training and a different definition for purposes of other enumerated benefits. A "plan" or "program" established for the purpose of providing sickness or vacation benefits would be an employee welfare benefit plan, but a "plan" or "program" established for the purpose of providing apprenticeship or other training would not. Needless to say, the same words cannot have two different and contradictory meanings in the context of a single statute.

This Court rejected a similar attempt to rewrite the express language of ERISA in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). The appellant argued that the Maine statute mandating severance pay to employees affected by a plant closing was preempted because it related to a type of *benefit* listed in ERISA. 482 U.S. at 7. Applying the literal language of ERISA's preemption provision, 29 U.S.C. § 514(d), the Court noted that it preempts state laws relating to any "employee benefit plan" not state laws relating to any "employee benefit." *Id.* This Court therefore declined the invitation to read the word "plan" out of ERISA's preemption provision. 482 U.S. at 8. The AFL-CIO's invitation to read the words "plan" and "program" out of ERISA § 3(1) must also be declined.

Similarly, the United States would rewrite ERISA § 3(1) to define an employee welfare benefit plan as a "funded" plan or program established for the purpose of providing apprenticeship or other training. Nowhere in the statutory text is there any indication that a plan or program must be *funded* in order to qualify as an employee welfare benefit plan. Indeed, the disjunctive nature of the phrase "plan, fund *or* program" suggests just the opposite. Many employee welfare benefit plans are "unfunded" in the sense that they are paid out of an employer's general assets. *See, e.g.*, 29 C.F.R. § 2520.104-20(b)(2).

This Court recently had occasion to observe that a straightforward, natural reading of a statutory provision must always prevail over the speculative possibility that a legislative oversight occurred. *United Food & Commercial Workers Union, Local 751 v. Brown Group, Inc.*, ___ U.S. ___, 116 S. Ct. 1529, 1533 (1996). The statutory constructions advocated by the United States and amicus AFL-CIO are precisely the type of speculative possibilities that this Court refused to endorse in *Brown*.

In *Hydrostorage*, some of these same Petitioners and same counsel made the identical argument which amicus AFL-CIO is advancing here – that only an apprenticeship *fund* qualifies as an employee welfare benefit plan. The Ninth Circuit refused the invitation to "eschew a literal interpretation of ERISA's definition and defer instead to Congress's broader purpose behind the statute." 891 F.2d at 728. The court further observed that the State of California's "argument is essentially one for statutory revision and is properly directed to the Legislative Branch." *Id., citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 106.

C. A Literal Reading Of Section 3(1) Is Consistent With The Purposes Of ERISA

Congress had many purposes in passing ERISA. One purpose was to safeguard employees from the abuse and mismanagement of funds that are accumulated to finance various types of benefits. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 15. If that were the sole purpose of ERISA, a narrow, non-literal reading of § 3(1) might have some appeal. However, Congress had other purposes in enacting ERISA, and those other purposes are consistent with the literal definition of an employee welfare benefit plan set forth in section 3(1).

The Congressional declaration of policy set forth in ERISA states that:

> It is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of such [employee benefit] plans.

29 U.S.C. § 1001(a). Based on this Congressional declaration of policy, this Court observed in *Fort Halifax* that "[t]he focus of the statute is on the administrative integrity of benefit plans, which assumes that some type of administrative activity is taking place." 482 U.S. at 15.

An apprenticeship program, like other types of ERISA plans, involves ongoing administrative activities. Funds must be collected and disbursed, training standards and qualifications must be established and administered, supplemental instruction must be provided, and employees must be hired to perform these tasks. This is one of many reasons why apprenticeship programs are

covered by ERISA. *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1558; *Keystone Chapter, ABC v. Foley*, 37 F.3d at 954.

Another Congressional purpose in enacting ERISA was to protect participants in employee benefit plans "by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto . . . " 29 U.S.C. § 1001(b). Although apprenticeship programs can be exempted from ERISA's reporting requirements (29 C.F.R. § 2520.104-22), the salutary effects of reporting and disclosure requirements and fiduciary standards of conduct are equally applicable to apprenticeship programs. If amicus AFL-CIO were to prevail on this threshold issue, fiduciary standards would apply to the financial aspects of an apprenticeship fund, but nothing more. If the United States were to prevail, unfunded apprenticeship programs would not be subject to fiduciary standards. Either way, the interests of employees in receiving apprenticeship training and instruction would be threatened.

Another overriding purpose of ERISA is to protect employee benefit plans from "the threat of conflicting or inconsistent state and local regulation of employee benefit plans." 120 Cong. Rec. 29933 (1974). *See Fort Halifax*, 482 U.S. at 9. Many apprenticeship programs operate on a multi-state basis. *See National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1558 (NEIEP is a "national" training program for helpers in the elevator industry); *ABC, National Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343, 345 (9th Cir. 1995) (the apprenticeship trust was headquartered in Florida and provided training

to an Oregon corporation performing a state public works project in California). The statutory interpretation urged by amicus AFL-CIO would expose all multi-state apprenticeship programs to the threat of conflicting regulations.

D. The Secretary Of Labor's Own Regulations Support A Literal Reading Of Section 3(1)

Although the regulations issued by the Secretary of Labor pursuant to ERISA will not assist the Court in determining whether all aspects of an apprenticeship program constitute an employee welfare benefit plan, the regulations issued pursuant to the Fitzgerald Act, 29 U.S.C. § 50, are of considerable assistance. The Fitzgerald Act regulations contain the following definition of an "apprenticeship program":

> *Apprenticeship program* shall mean a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, including such matters as the requirement for a written apprenticeship agreement.

29 C.F.R. § 29.2(f).

The words "program" and "plan" in the foregoing regulation are used in a way which is totally inconsistent with the statutory interpretations of "plan, fund or program" offered by the United States and amicus AFL-CIO. As used in the regulation, the words "program" and "plan" have an expansive meaning, encompassing all

aspects of an apprenticeship program such as qualification, recruitment, selection, employment and training. That expansive meaning cannot be reconciled with the AFL-CIO's view that a "plan, fund or program," as that term is used in ERISA § 3(1), is limited to the funding mechanism for an apprenticeship program. Similarly, the regulation does not distinguish between funded and unfunded apprenticeship programs.

One of the few ERISA regulations which deals specifically with apprenticeship and training programs is 29 C.F.R. § 2520.104-22. It provides an exemption from ERISA's reporting and disclosure requirements for an "employee welfare benefit plan" which exclusively provides "apprenticeship training benefits or other training benefits." The unstated premise of that regulation is that, in the apprenticeship context, an employee welfare benefit plan includes far more than the funding mechanism; it also includes the course of study and the procedures for delivering that course of study. *See* 29 C.F.R. § 2520.104-22(b).

Counsel for Respondent is aware of only two Labor Department Advisory Opinions applying the requirements of ERISA to an apprenticeship or training program. U.S. Dept. of Labor ERISA Advisory Op. No. 76-03 (March 17, 1976); U.S. Dept. of Labor ERISA Advisory Op. No. 86-27A (Dec. 15, 1986). In each Advisory Opinion, the Secretary of Labor assumed that various aspects of apprenticeship and training plans are subject to the requirements of ERISA. In neither Advisory Opinion does the Secretary of Labor distinguish between the funding mechanism for an apprenticeship program and the other

aspects of an apprenticeship program. Nor does the Secretary draw any distinction between funded and unfunded apprenticeship programs. If the distinctions advanced by the United States and the AFL-CIO had any basis in legislative intent, one would have expected them to be reflected in these Advisory Opinions.

E. The Secretary Of Labor's Payroll Practice Regulation Does Not Support A Narrow Interpretation Of Section 3(1)

The payroll practice regulation so heavily relied upon by the United States and the AFL-CIO is, by its very terms, inapplicable to this case. The regulation provides that the payment of certain types of compensation, *out of the employer's general assets,* does not constitute an employee welfare benefit plan. 29 C.F.R. § 2510.3-1(b)(3). However, the E&C JATC, like most jointly administered apprenticeship programs, does not rely solely on payments from the general assets of participating employers. It is a multiemployer fund which pools the contributions from many different employers to create a fund and a program which is separate and distinct from each individual employer.

The United States would have the Court ignore the clear and specific limiting language of the payroll practice regulation. If the Secretary of Labor truly intended to exempt all apprenticeship and training programs from the definition of an employee welfare benefit plan, the regulation would not have been limited to payments "out of the employer's general assets." This also disposes of the United States' reliance on 29 C.F.R. § 2510.3-1(k)

(unfunded scholarship programs), since that regulation is also limited to programs "under which payments are made solely from the general assets of an employer or employee organization."

In the context of an apprenticeship or training program, the term "payments of compensation," as used in the payroll practice regulation, makes very little sense. The payments by an apprenticeship fund are generally to instructors and trainers, not for "periods of time during which an employee performs little or no productive work while engaged in training," but rather as compensation for the training and instruction provided.

In applying the payroll practice regulation to an unfunded vacation policy in *Massachusetts v. Morash*, 490 U.S. 107 (1989), this Court emphasized that ordinary vacation payments do not present any of the risks that ERISA is intended to address. Ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control. 490 U.S. at 115. In contrast, vacation payments subject to ERISA are "those vacation benefit funds . . . in which either the employee's right to a benefit is contingent upon some future occurrence *or the employee bears a risk different from his ordinary employment risk.*" 490 U.S. at 116 (emphasis added).

Apprenticeship and training benefits, like ERISA vacation funds, involve a substantially greater risk than the ordinary risk of employment. If an apprenticeship program is not well run and administered, there is a risk that apprenticeship benefits will have minimal value, or possibly, that the apprenticeship program will collapse,

leaving the apprentices without any formal training whatsoever. *Southern California Chapter, ABC v. Aubry*, 4 Cal. 4th at 440 ("it is obvious that an apprentice incurs a risk different from the risk of ordinary employment").

In *Morash*, this Court emphasized that its decision was limited to vacation payments by a single employer out of its general assets. A different situation would have been presented, the Court observed, "if a separate fund had been created by a group of employers to guarantee the payment of vacation benefits to laborers who regularly shift their job from one employer to another." 490 U.S. at 120. In that case, "employees who are beneficiaries of such a trust face far different risks and have far greater need for reporting and disclosure requirements. . . ." *Id.*

The E&C JATC and similar multiemployer apprenticeship programs pose the same risks as multiemployer vacation funds. Thus, neither the plain language nor the underlying rationale of the payroll practice regulation supports a narrow definition of an employee welfare benefit plan.

F. ERISA's Limited Legislative History Is Consistent With The Plain Language Of Section 3(1)

1. The 1973-1974 Legislative History

Several early drafts of the legislation that was ultimately enacted as ERISA included the term "employee benefit *fund*" within their definitional sections. For example, S.4 (January 4, 1973) defined the term as follows:

> The term 'employee benefit fund' or 'fund' means a fund of money or other assets maintained pursuant to or in connection with an employee benefit plan and includes employee contributions withheld but not yet paid to the plan by the employer. The term does not include. . . .

Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, Legislative History of the Employee Retirement Income Security Act of 1974 at 147 (hereinafter "Legislative History of ERISA").

Virtually identical definitions of an "employee benefit fund" appeared in subsequent drafts of the proposed legislation. *Id.* at 284, 542, 958-59, 1413, 3744. The term "employee benefit fund" sometimes existed side by side with a definition of "employee benefit plan" or "employee welfare benefit plan" very similar to the text of ERISA § 3(1). *Id.* at 958.

As ultimately enacted by Congress, ERISA does not use "employee benefit fund" as a defined term. Thus, the drafters of ERISA considered, but did not adopt, a definition of "employee benefit fund" which closely corresponds to how the AFL-CIO would define the term "employee welfare benefit plan" in an apprenticeship context. The Congressional omission of such a term which was expressly before it in proposed legislation is significant. *Mackey v. Lanier Collections Agency*, 486 U.S. 825, 837 (1988).

ERISA's Legislative History contains a brief but revealing explanation of why the term "employee welfare benefit plan" includes apprenticeship and training programs. In an executive meeting on March 20, 1973, the

Senate Committee on Labor and Public Welfare adopted three amendments, including:

> An amendment offered by Senator Javits extending coverage of the fiduciary and disclosure amendments to the WPPDA [Welfare Pension Plans Disclosure Act] to all *benefit arrangements* described in or permitted by Section 302 of the Taft-Hartley Act. These *benefit arrangements* would include jointly administered vacation funds, *apprenticeship training funds*, day care centers, scholarship funds, etc. (Sec. 503).

Legislative History of ERISA at 601, 635-36 (emphasis added.)

The choice of the term "benefit arrangements" is significant. It strongly suggests that Senator Javits' amendment was intended to bring all "arrangements" for providing apprenticeship and training benefits within the protection of ERISA, and not merely the trust funds which are used to fund those benefits.

2. The Congressional Failure To Amend ERISA To Overrule *Hydrostorage* Is Instructive Regarding Congressional Intent

In response to the Ninth Circuit's decision in *Hydrostorage* and other cases which applied ERISA's preemption provision to apprenticeship programs, legislation was introduced in both the House and the Senate in 1993 for the express purpose of overruling those decisions. *See* H.R. 1036, 103rd Cong., 1st Sess. (1993); S. 1580, 103rd Cong., 1st Sess. (1993). Those bills would have amended ERISA to provide that ERISA does not preempt state laws establishing minimum standards and regulating certified

apprenticeship programs. *See* 139 Cong. Rec. H. 8958 (1993) (statement of Rep. Beilenson introducing H.R. 1036). The bills were in direct response to the Ninth Circuit's *Hydrostorage* decision. *See* 139 Cong. Rec. H. 8961. Many of the interested parties which are appearing as *amici* in this case, including the AFL-CIO, the National Association of State Apprenticeship Directors, the National Association of Attorneys General and the National Electrical Contractors Association, were supporters of the proposed legislation. *See* 139 Cong. Rec. H. 8960.

H.R. 1036 passed the House in 1993. 139 Cong. Rec. H. 8977. However, the bill never emerged from the Senate and never became law. 140 Cong. Rec. D. 230, 233 (Mar. 10, 1994) (digest entry regarding the recess of Senate hearings on H.R. 1036 and S. 1580 subject to call).

Congressional failure to act on a proposed amendment of a disputed statutory provision is "instructive" but not conclusive. *Bowsher v. Merck & Co.*, 460 U.S. 824, 837 n.12 (1983); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989). In *Bruch*, the Court refused to ascribe significance to Congress's failure to amend ERISA after most federal courts had adopted an arbitrary and capricious standard of review. Prior to the *Bruch* decision, ERISA was silent on the appropriate standard of review. 489 U.S. at 109.

This is a far stronger case than *Bruch* or *Bowsher* for ascribing significance to Congress's failure to pass a proposed amendment. ERISA is not silent regarding the definition of an "employee welfare benefit plan." For 22 years now, the statute has provided that an employee welfare

benefit plan includes a "plan, fund or program . . . established or maintained for the purpose of providing . . . apprenticeship or other training programs. . . . " 29 U.S.C. § 1002(1). Given the plain language of section 3(1) and the numerous judicial decisions interpreting that language literally, the Senate's refusal to pass H.R. 1036 or S. 1580 must be seen as a considered decision not to amend the key definitional term in ERISA. Coupled with the plain language of the statute, the uniform judicial interpretations of section 3(1), the statutory purposes and the other legislative history, Congress's failure to overrule *Hydrostorage* is both instructive and significant.

II. CALIFORNIA'S PREVAILING WAGE LAW RELATES TO ERISA APPRENTICESHIP PLANS

A. ERISA's Preemption Clause Must Be Given An Expansive Interpretation, Notwithstanding This Court's Decision In *Travelers*

This Court's pronouncements regarding ERISA's preemption clause, 29 U.S.C. § 1144(a), are familiar and frequently applied. They bear repeating only because of Petitioners' argument that *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671 (1995) constitutes a radical change in ERISA preemption analysis.

ERISA section 514(a) is a "virtually unique" preemption provision, *Franchise Tax Board v. Laborers Vacation Trust Fund*, 463 U.S. 1, 29 n.26 (1983), which is "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). The "deliberately expansive" language of ERISA's preemption clause was "designed to 'establish

pension plan regulation as exclusively a federal concern.' " *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

Although preemption is ultimately a question of Congressional intent, this Court has stated that it will give effect to the plain language of ERISA section 514(a) "unless there is good reason to believe Congress intended the language to have some more restrictive effect." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). The key phrase in section 514(a) consists of the words "relate to." "Congress used those words in their broad sense, rejecting more limited pre-emption language that would have made the clause 'applicable only to state laws relating to the specific subjects covered by ERISA.' " *Ingersoll Rand*, 498 U.S. at 138 (*quoting Shaw*, 463 U.S. at 98).

In *Shaw*, this Court explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." 463 U.S. at 96-97. Although the "relate to" clause is clearly expansive, there are limits to the reach of the preemption clause. *Travelers*, 115 S. Ct. at 1677. Thus, ERISA does not preempt a state law which has only a "tenuous, remote or peripheral connection" with covered plans, as is the case with many laws of general applicability. *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 113 S. Ct. 580 n.1 (1992).

In *Shaw* and subsequent cases, this Court developed several standards for determining if a state law is presumptively preempted by ERISA. If a state law is presumptively preempted, the inquiry ends there and the preemption analysis employed in *Travelers* does not come into play. As explained below, application of California's

prevailing wage law in the context of this case is presumptively preempted by ERISA and the *Travelers* preemption analysis is therefore inapplicable. Stated differently, the *Travelers* analysis enables a court to determine if a state law has only a "tenuous, remote or peripheral" connection with an ERISA plan; it is not to be utilized in every case and it does not constitute a dramatic shift in ERISA preemption analysis.

B. The Application Of California's Prevailing Wage Law Is Presumptively Preempted Because It "Refers To" ERISA Plans

Where a state law "specifically refers to" employee welfare benefit plans regulated by ERISA, the state law is preempted "on that basis alone." *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. at 583. The continuing vitality of this rule was reaffirmed in *Mackey v. Lanier Collections Agency*, 486 U.S. at 829.

Travelers did not alter the "reference to" strand of ERISA preemption analysis. The Court in *Travelers* was careful to point out that the New York statute at issue did not make "reference to" an ERISA plan. 115 S. Ct. at 1677. As a result, it was necessary for the court to determine if the New York surcharge law had a "connection with" ERISA plans, an inquiry that is not necessary in this case.

California's prevailing wage statute at issue in this case, Labor Code section 1777.5 (Pet. App. 58-63), specifically refers to employee welfare benefit plans (apprenticeship programs) in numerous ways. It permits the employment of apprentices on state-funded public works

projects, subject to stringent conditions. Apprentices on state public works projects must be paid the "standard wage" paid to apprentices under the regulations of the craft or trade at which he or she is employed. Pet. App. 58. Most importantly, only apprentices who are in training under apprentice standards and written apprentice agreements approved by the California Apprenticeship Council are eligible to be employed on state-funded public works projects. *Id.* The employment and training of each apprentice must be in accordance with the same apprentice standards and written apprentice agreements. *Id.* Virtually every provision and every sentence of § 1777.5 makes express reference to joint apprenticeship committees, apprentice standards and the terms on which apprentices may be employed on state public works projects. Since apprenticeship programs, including apprentice standards, constitute employee welfare benefit plans, section 1777.5 "specifically refers to" ERISA plans.

The California Supreme Court, in a very similar context, had no difficulty in concluding that Labor Code section 1777.5 "expressly refer[s] to apprenticeship programs including their standards." *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th at 441. On that basis alone, section 1777.5 "relates to" an ERISA-regulated apprenticeship plan. *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. at 583.

C. California Labor Code Section 1777.5 Is Presumptively Preempted Because It Mandates Benefits To Be Provided By An ERISA Apprenticeship Program

A state law which requires an employer to provide "specific benefits" through an employee welfare benefit plan relates to an ERISA plan. *Shaw*, 463 U.S. at 97. In *Shaw*, New York's Disability Benefits Law "related to" employee welfare benefit plans because it required employer-sponsored health plans to provide sick leave benefits to employees unable to work on account of pregnancy and other nonoccupational disabilities. *See also FMC Corp. v. Holliday*, 498 U.S. at 59 ("state laws . . . requiring plans to provide specific benefits 'relate to' benefit plans").

This principle is implicit in the definitional section of ERISA's preemption provision. ERISA section 514(c)(2) provides that:

> The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the *terms and conditions* of employee benefits plans covered by this subchapter.

29 U.S.C. § 1144(c)(2) (emphasis added). Although this limiting language does not mean that ERISA preempts only those state laws which purport to regulate the "terms and conditions" of benefit plans, *Ingersoll Rand v. McClendon*, 498 U.S. at 141, the converse is true: ERISA most definitely preempts state laws which do regulate the terms and conditions of ERISA plans.

Again, *Travelers* did not disturb the validity of this presumptive rule. In distinguishing *Shaw v. Delta Air Lines, FMC Corp. v. Holliday* and *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504 (1981), the Court in *Travelers* observed that "[i]n each of these cases, ERISA preempted state laws that mandated employee benefit structures or their administration." 115 S. Ct. at 1678.

California Labor Code section 1777.5 mandates that various benefits be provided by ERISA-regulated apprenticeship programs. As this case clearly shows, section 1777.5 regulates the wages which must be paid to apprentices on state public works projects. Wages are essential terms and conditions of an apprenticeship program. In addition, section 1777.5 dictates the type and amount of training received by apprentices, the standards and written agreements under which apprentices receive their training, the hours worked by apprentices and the ratio of apprentices to journeymen. Pet. App. 56-63. All of these affect the amount and the quality of the benefits (training) received by apprentices pursuant to an apprenticeship program.

For this reason, the lower courts have ruled that Labor Code section 1777.5 and similar statutes "relate to" ERISA apprenticeship plans. The California Supreme Court stated that section 1777.5 and related statutes "prescribe minimum terms and conditions for apprenticeship training that programs must meet in order to be eligible for approval and thus for certain financial benefits." *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th at 441. In *Boise Cascade Corp. v. Peterson*, 939 F.2d at 637, the Eighth Circuit similarly

concluded that a state-mandated apprentice to journeyman ratio "relates to" ERISA covered apprenticeship programs.

This strand of ERISA preemption analysis is dictated by the structure of ERISA. The statute does not regulate the substantive content of employee welfare benefit plans and does not require employers to provide any given set of minimum benefits. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985); *Travelers*, 115 S. Ct. at 1674. ERISA leaves it up to private parties, not the government, to determine the level of benefits provided by employee welfare benefit plans. *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. at 511. State laws such as section 1777.5 which set the level of benefits which must be provided by an ERISA plan interfere with one of the central tenets of ERISA.

D. Labor Code Section 1777.5 Is Presumptively Preempted Because It Is "Specifically Designed" To Affect ERISA Apprenticeship Programs

This Court has "virtually taken it for granted" that state laws which are "specifically designed to affect employee benefit plans" are preempted by ERISA. *Mackey v. Lanier Collection Agency*, 486 U.S. at 829; *Ingersoll Rand Co. v. McClendon*, 498 U.S. at 140. In *Ingersoll Rand*, for example, the state law cause of action under scrutiny was premised on the existence of a pension plan. 498 U.S. at 140.

For the very same reasons that Labor Code section 1777.5 "refers to" ERISA apprenticeship programs, the

statute is "specifically designed" to affect such plans. Indeed, the "specifically designed to affect" strand of ERISA preemption analysis may be simply a restatement of the "refers to" test set forth in *Shaw*. As in *Ingersoll Rand*, section 1777.5 is premised on the existence of apprenticeship programs covered by ERISA.

Examining a different aspect of Labor Code section 1777.5, the Ninth Circuit concluded that the statute is "specifically designed to affect" ERISA apprenticeship programs. *Hydrostorage*, 891 F.2d at 730. In that case, the State of California was applying section 1777.5 to force a nonunion employer to comply with an apprenticeship plan and apprenticeship standards established pursuant to collective bargaining. *Id.* at 723; *see also Boise Cascade Corp. v. Peterson*, 939 F.2d at 637 (state mandated apprentice to journeyman ratio was specifically designed to affect ERISA apprenticeship programs).

E. The Fact That The E&C JATC Is The Product Of Collective Bargaining Militates Strongly In Favor Of A Finding Of ERISA Preemption

Although the issue of NLRA preemption is not before the Court, the fact that the E&C JATC is the result of collective bargaining is an important consideration in an ERISA preemption analysis. In *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. at 526, the Court ruled that ERISA preempted a New Jersey statute limiting the offset of pension benefits on account of workers' compensation awards. In reaching this conclusion, one "consideration" was the collectively-bargained nature of the pension plan at issue:

> Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for pre-emption of state efforts to regulate pension terms. [citations.] As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring pre-emption of intrusive state law.

451 U.S. at 525-26 (citations and footnotes omitted).

The same is true of the E&C JATC. It is undisputed that the E&C JATC resulted from collective bargaining between a multiemployer bargaining group and the National Electronic Systems Technicians Union (NESTU).

F. California Labor Code Section 1777.5 Relates To Employee Welfare Benefit Plans Because It Differentiates Between State-Approved and Non-Approved ERISA Plans

The Tenth Circuit, in *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir. 1992), and the Ninth Circuit in this case utilized a different, but complimentary, analysis in concluding that state prevailing wage laws, when applied to apprentices, "relate to" an employee welfare benefit plan. In *Calhoon*, the State of Oklahoma took the position that helpers participating in the National Elevator Industry Education Program (NEIEP) had to be paid at the higher mechanic's wage rate because the NEIEP was not approved by the Federal

Bureau of Apprenticeship Training (BAT).[3] In ruling that the Oklahoma prevailing wage law relates to an employee welfare benefit plan, the Tenth Circuit reasoned that a state law may not, consistent with ERISA, favor one type of ERISA plan over other ERISA plans:

> We accept, as a general proposition, the state's right to regulate wages. But a wage law that provides an option favoring certain ERISA plans and benefits (BAT approved plans) over other ERISA plans and benefits (NEIEP) is not a law of "general application" and may be used to effect change in the administration, structure and benefits of an ERISA plan. If a state is permitted to use a prevailing wage scheme to single out and favor certain ERISA plans over other ERISA plans, the potential for abuse is great – a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans.

957 F.2d at 1561. In this case, the Ninth Circuit adopted the reasoning of the Tenth Circuit in concluding that application of California's prevailing wage statute relates to an ERISA plan. Pet. App. 13-15.

The "relate to" analysis employed by the Ninth and Tenth Circuits is consistent with, if not required by, one of the central tenets of ERISA. As explained previously, ERISA does not regulate the substantive content of employee welfare benefit plans; the level of benefits provided by ERISA plans is left to the control of private

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[3] Oklahoma apparently does not have a State Apprenticeship Agency or State Apprenticeship Council approved by BAT pursuant to 29 C.F.R. § 29.12.

parties. *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. at 511. If states were permitted to grant certain benefits to state-approved apprenticeship plans and to deny the same benefits to non-approved plans, states would be able to affect the substantive content of benefit plans, thereby depriving private parties of a right guaranteed by ERISA.

G. Application Of ERISA's Preemption Clause Is Necessary To Prevent Conflicting And Inconsistent State And Local Regulation Of Apprenticeship Plans

Any state law which risks subjecting ERISA plans to conflicting state regulations satisfies the "relate to" test of ERISA's preemption clause. *FMC Corp. v. Holliday*, 498 U.S. at 59. When state prevailing wage laws such as Labor Code section 1777.5 are applied to apprentices, there is a strong likelihood that ERISA apprenticeship programs will be subjected to conflicting state regulation.

As noted previously (Section I.C above), many apprenticeship programs operate on a multi-state basis. If state prevailing wage laws such as section 1777.5 may be applied against apprentices without limitation, employers participating in multi-state apprenticeship programs will be required to pay different wages and benefits to apprentices, depending on the state where the work is being performed. This would create chaos for apprenticeship programs operating in more than one state.

For employers like Sound Systems which participate in a regional, single state apprenticeship program, the risk of inconsistent state regulation is less likely but still possible. If Sound Systems were to successfully bid on a

project in Oregon or Nevada, it would presumably use its regular employees, some of whom are participants in the E&C JATC. Permitting Oregon or Nevada to apply its own prevailing wage law to apprentices participating in the E&C JATC would pose the same risk of conflicting state regulation.

H. *Travelers* Does Not Assist Petitioners

Although the text of ERISA's preemption provision is unhelpful, that does not mean that every ERISA preemption issue requires the same detailed analysis which this Court undertook in *Travelers*. As explained above, if a state law specifically refers to ERISA plans, is specifically designed to affect ERISA plans, or directly affects the benefits provided by ERISA plans, the inquiry ends there. For this reason alone, *Travelers* does not control this case.

Beyond that, the surcharge statute at issue in *Travelers* had, at most, an indirect influence on ERISA plans. It affected the cost of providing medical insurance, but rate variations were a normal feature of the health care industry before and after ERISA. *Travelers*, 115 S. Ct. at 1679. However, the surcharges did not interfere with a plan's uniform administrative practices or the provision of a uniform interstate package. *Id.*

In contrast, a state prevailing wage statute has a direct and immediate impact on an apprenticeship program and its employee participants. On state-funded public works projects, it can force employers to pay apprentices more than the wage rates set forth in the

apprenticeship standards, which in this case were established through collective bargaining.

Unlike in *Travelers*, a state prevailing wage law does interfere with the uniform administration of an ERISA plan. On private construction jobs employers are able to pay apprentices in accordance with the apprenticeship standards, but on state public works projects employers can be required to pay different, higher wage rates. This potential for disrupting apprenticeship programs undermines Congress's intent "to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern.' " *Travelers*, 115 S. Ct. at 1677 (*quoting Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. at 523).

For these reasons, Petitioners' reliance on *Travelers* was squarely rejected by the Ninth Circuit in *ABC National Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343 (9th Cir. 1995), one of several ERISA preemption cases involving apprenticeship issues decided by the Ninth Circuit after this case. Confronting precisely the same argument which Petitioners advance here, the Ninth Circuit explained that:

> Appellees argue that the California statutes here have only an indirect economic effect, like the statute in *Blue Cross*. Unlike the ability to pay into certain apprenticeship funds, however, rate variations among hospital providers are unremarkable, accepted examples of cost variation. *Id.* Charge differentials for commercial providers varied dramatically prior to state regulations, "presumably reflecting the geographically disparate burdens of providing for the uninsured." *Id.* (citations omitted). In contrast, given the competitive nature of the bid process for

> public works contracts, contractors cannot opt to pay prevailing wages to trainees or apprentices in unapproved programs. They must find a state approved program or forego using apprentices, and they must either pay into state approved programs or undertake a complicated set-off procedure to equalize the payment. The market for apprentice programs simply does not equate with the market for health care providers.

68 F.3d at 347; *see also Inland Empire Chapter, AGC v. Dear*, 77 F.3d 296, 299-300 (9th Cir. 1996) (rejecting the State of Washington's argument that the Ninth Circuit's decision in this case was inconsistent with *Travelers*).

I. The Extent To Which States Have Traditionally Regulated Apprenticeship Is Irrelevant To The Preemption Analysis In This Case

Travelers does not require a court to undertake an extensive analysis of a state's regulatory interest in each and every ERISA preemption case. To escape preemption, a state law must operate in an area of traditional state regulation *and* affect an ERISA plan in a tenuous, remote or peripheral way. *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), aff'd mem., 477 U.S. 901 (1986). However, if Congressional intent is clear, "that is the end of the matter" and no further inquiry is necessary. *FMC Corp. v. Holliday*, 498 U.S. at 57. As the Ninth Circuit stated in response to virtually the same argument, "[a] purported fundamental state interest is relevant only when there is an element of uncertainty as to whether the challenged state law falls within the scope of the ERISA preemption clause." *Local Union 598 v. J.A. Jones*

Constr. Co., 846 F.2d 1213, 1220 (9th Cir. 1988), *aff'd*, 488 U.S. 881 (1988).

In this case, there is no uncertainty as to whether a state prevailing wage law, when applied to apprentices, relates to an ERISA apprenticeship plan. That some states may have regulated apprenticeship prior to ERISA is therefore irrelevant. *See Boise Cascade Corp. v. Peterson*, 939 F.2d at 637-38 (rejecting the argument that a minimum apprentice to journeyman ratio is valid as an exercise of traditional state regulation over occupational training); *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th at 445 n.18 (Labor Code § 1777.5 does not affect apprenticeship plans in a "tenuous, remote or peripheral way" because it mandates that apprenticeship plans adhere to specific terms and conditions in order to receive state and federal benefits).

III. APPLICATION OF THE STATE PREVAILING WAGE LAW TO APPRENTICES IS NOT SAVED BY ERISA'S SAVINGS CLAUSE

A. ERISA's Savings Clause Is Narrowly Construed

Unlike the general preemption clause, which has consistently been given an expansive interpretation, ERISA's savings clause, 29 U.S.C. § 1144(d), has been narrowly construed. In *Shaw*, this Court explained that ERISA's structure and legislative history caution against applying the savings clause too expansively. 463 U.S. at 104. Since Congress applied the principle of preemption "in its broadest sense" and created very limited exceptions to

preemption, this Court refused to treat ERISA § 514(d) as a general savings clause. *Id.*

In *Shaw*, it was argued that New York's entire Human Rights Law was preempted by ERISA. The Court refused to take ERISA preemption that far because many state anti-discrimination laws prohibit the same practices which are prohibited by Title VII. Furthermore, Title VII requires aggrieved employees to utilize available state remedies. In both ways, New York's Human Rights Law provided "a means of enforcing Title VII's commands" and to that extent was saved from preemption by the savings clause. 463 U.S. at 101-102.

However, the New York Human Rights Law also prohibited certain practices which at that time were lawful under Title VII. Specifically, the New York statute required employers to treat pregnancy the same as other nonoccupational disabilities, something which Title VII did not require until years later. To the extent that the New York statute prohibited conduct and practices which were permitted by federal law, the state law was not saved from preemption. 463 U.S. at 103-104.

It is against this framework that the Fitzgerald Act and its implementing regulations must be judged.

B. The Fitzgerald Act And The Implementing Regulations Establish A Voluntary System Designed To Encourage Apprenticeship

Unlike Title VII, which makes various employment practices unlawful, the Fitzgerald Act and its implementing regulations establish a voluntary, nonmandatory system of promoting apprenticeship. As the Tenth Circuit

explained in *National Elevator Industry v. Calhoon*, the Fitzgerald Act "merely seeks to facilitate the development of apprenticeship programs." 957 F.2d at 1562.

Neither the Fitzgerald Act nor the implementing regulations require employers to employ apprentices. Similarly, federal law does not require employers to establish an apprenticeship program. *Associated Builders and Contractors v. Perry*, 817 F. Supp. 49, 53 (E.D. Mich. 1992).

If an employer or employer group chooses to establish an apprenticeship program, there is no requirement that the program register with a state or the federal government. *Associated Builders and Contractors v. Perry*, 817 F. Supp. at 53. Nor is there any requirement that an apprenticeship program obtain state or federal approval. Employers who establish an apprenticeship program without adhering to the apprenticeship standards promulgated by the Secretary of Labor do not violate federal law. *Southern California Chapter, ABC v. Aubry*, 4 Cal. 4th at 452; *Associated Builders and Contractors v. Perry*, 817 F. Supp. at 53. Although the Fitzgerald Act encourages employers to follow federal standards, it does not discourage other non-approved programs which choose to ignore the federal standards. *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1562. In short, whether to establish an apprenticeship program and how to run it are completely voluntary decisions.

Instead of relying on directives and commands, the regulations implementing the Fitzgerald Act, 29 C.F.R. § 29.1 *et seq.*, rely on various incentives to encourage compliance with the federal apprenticeship standards. Most importantly, employers who do not participate in an

apprenticeship program complying with *federal* apprenticeship standards (29 C.F.R. § 29.5) are not eligible to employ apprentices at apprentice wage rates on federally-funded Davis-Bacon projects.

An apprenticeship program may be approved as complying with federal apprenticeship standards in one of two ways. The apprenticeship program may apply for approval directly to the Bureau of Apprenticeship Training (BAT), or it may apply to a recognized State Apprenticeship Agency or State Apprenticeship Council in those states where BAT has approved a state agency for that purpose. 29 C.F.R. § 29.2(l).

When an apprenticeship program is approved by BAT or a State Apprenticeship Council, approval is for *federal purposes only*. The Fitzgerald Act's implementing regulations repeatedly state that apprenticeship programs are approved for *federal purposes*. *See, e.g.*, 29 C.F.R. § 29.2(k), (l), (o); 29 C.F.R. § 29.3(a); 29 C.F.R. § 29.7(b)(9); 29 C.F.R. § 29.12(a), (e)(1) and (2); 29 C.F.R. § 29.13(b)(4), (d), (e), (f). Thus, the Secretary of Labor has authorized State Apprenticeship Councils to approve apprenticeship programs for *federal purposes*, but there is no indication in the Fitzgerald Act or the implementing regulations that State Apprenticeship Councils are authorized to approve apprenticeship programs for *state purposes*. As will be explained below, this is the key aspect of the Fitzgerald Act's implementing regulations for purposes of applying ERISA's savings clause.

C. California's Prevailing Wage Law Is Not A Means Of Enforcing The Fitzgerald Act

California's prevailing wage statute possesses none of the characteristics which saved most of New York's Human Rights Law from preemption in *Shaw*. Given the voluntary, non-mandatory nature of the Fitzgerald Act and its implementing regulations, state law does not provide a means of enforcing federal law. As the Tenth Circuit observed, "there is nothing in [the Fitzgerald Act] to enforce." *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1562. *See also Hydrostorage*, 891 F.2d at 731 (Lab. Code § 1777.5 "clearly is not an enforcement mechanism of federal law"); Pet. App. 17-18 (same); *Associated Builders and Contractors v. Perry*, 817 F. Supp. at 53.

Stated differently, the Fitzgerald Act is nothing more than a statement of policy and good intentions. Unlike Title VII, it does not prohibit any conduct and therefore there are no commands in the Fitzgerald Act capable of being enforced. Unlike Title VII's enforcement scheme, employees are never required to resort to state law in order to enforce rights granted by the Fitzgerald Act.

In *Shaw*, the Court emphasized that Title VII expressly preserves non-conflicting state laws. 463 U.S. at 101. Neither the Fitzgerald Act nor its implementing regulations contain a comparable provision, and this is an additional factor favoring preemption. *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d at 1562; *Associated Builders and Contractors v. Perry*, 817 F. Supp. at 51; Pet. App. 17.

Shaw teaches that a state law which prohibits conduct permitted by federal law is not saved by ERISA's savings clause. 463 U.S. at 103. By the same reasoning, when a state prohibits the employment of non-approved apprentices on a state public works project, ERISA's savings clause does not apply because federal law is silent with regard to the employment of apprentices on state-funded public works projects.

D. If ERISA's Savings Clause Has Any Application to the Fitzgerald Act, It Is Limited To State Approval Of Apprenticeship Programs Solely For *Federal Purposes*

ERISA's savings clause operates to save any "rule or regulation" as well as any law of the United States. 29 U.S.C. § 1144(d). Thus, it is possible that the savings clause has some application to the regulations adopted by the Secretary of Labor pursuant to the Fitzgerald Act, even though it does not save the Fitzgerald Act itself.

Recognizing that possibility, Respondents suggest that the farthest possible reach of the savings clause is to preserve a state's ability to approve an apprenticeship program *for federal purposes*. Regardless whether an apprenticeship program is approved by BAT or a recognized State Apprenticeship Council, the Fitzgerald Act regulations merely state that such approval is effective "for federal purposes." *See, e.g.*, 29 C.F.R. § 29.2(l) and (o). However, there is nothing in the Fitzgerald Act regulations to indicate that states have been authorized to approve apprenticeship programs for non-federal purposes, i.e., state purposes.

Under this interpretation of the savings clause, it would preserve a state's ability to approve apprenticeship programs for federal purposes, such as the Davis-Bacon Act, 40 U.S.C. § 276a. Thus, apprentices who are participating in an apprenticeship program which has not been approved by the BAT or a recognized State Apprenticeship Council would not be eligible to work on federally-funded public works projects at apprentice wage rates.

Conversely, ERISA would still preempt a state's ability to approve apprenticeship programs solely for *state purposes*. Where, as here, a state's approval of an apprenticeship program relates solely to the eligibility of apprentices to work on a *state-funded* public works project, the state's application of its prevailing wage law is not saved by ERISA § 514(d).

The California Supreme Court's decision in *Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th 422 (1992) is not to the contrary. The Court refused to distinguish between approval for federal purposes and approval for state purposes because the plaintiffs were seeking to obtain approval of their apprenticeship program for both federal *and* state purposes. 4 Cal. 4th at 450 n.20. In this case, Respondents are not asking the Court to invalidate the authority of a State Apprenticeship Council to approve apprenticeship programs for federal purposes.

The position advocated by the Associated General Contractors amici goes too far. It would permit a state to exercise its approval function for both federal *and* state purposes, even though the Fitzgerald Act regulations

only authorize a State Apprenticeship Council to approve an apprenticeship program for federal purposes.

The Second Circuit's analysis of ERISA's savings clause in *JATC, Local 363 v. New York State Dept. of Labor*, 984 F.2d 589 (2d Cir. 1993) suffers from a similar flaw. The Second Circuit mistakenly believed that the Fitzgerald Act regulations give a BAT-approved State Apprenticeship Council the authority to deregister an apprenticeship program for nonconformity with federal or state law or federal or state standards. 984 F.2d at 592, 594. This is a misreading of the Fitzgerald Act regulations. They authorize an approved State Apprenticeship Council to "derecognize" an apprenticeship program for federal purposes only, and only for failing to comply with the federal apprenticeship standards set forth in the regulations promulgated by the Secretary of Labor. *See* 29 C.F.R. § 29.13. Nowhere do the Fitzgerald Act regulations permit a state to derecognize an apprenticeship program for failing to comply with state law or state standards, let alone for state purposes.

The bankruptcy case relied upon by Petitioners and the United States, *In Re Schein*, 8 F.3d 745 (11th Cir. 1993), is easily explained. The Bankruptcy Code expressly authorizes "opt out" states to determine the types and amounts of property which a debtor may retain in order to gain a "fresh start." 11 U.S.C. § 522(b). The Third Circuit in *Schein*, like the Fifth and Eighth Circuits before it, concluded that ERISA's savings clause operates to save the bankruptcy exemptions enacted by opt-out states pursuant to the authority of 11 U.S.C. § 522(b). 8 F.3d at 750-754.

The difference between *Schein* and this case is that the Bankruptcy Code expressly delegates to the states the right to determine what exemptions may be claimed by a debtor in possession. Federal law would therefore be impaired if debtors could not claim the exemptions which Congress authorized the states to define. *See Southern California Chapter, ABC v. California Apprenticeship Council*, 4 Cal. 4th at 451 n.22 (Bankruptcy Code exemptions are not comparable to the Fitzgerald Act in applying ERISA's savings clause). Here, in contrast, the Fitzgerald Act regulations do not authorize a state to create its own apprenticeship standards; they merely authorize a State Apprenticeship Council to apply federal apprenticeship standards solely for federal purposes.

CONCLUSION

The judgment of the court of appeals should be affirmed. If for any reason Respondents do not prevail on the issue of ERISA preemption, the case should be remanded to the Ninth Circuit with instructions to consider the issue of NLRA preemption.

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Respectfully submitted,

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